IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1218 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GHANSHYAMBHAI KURJIBHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR AZIZ AN ALVI for the Appellant. MR BG PATANI for the Appellant.
MS NANDINI JOSHI, APP for the Opponent State.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 13/06/2006

ORAL JUDGMENT

This appeal has been preferred by the appellant against the judgement 22nd September,2003 delivered by the

Learned Sessions Judge, Amreli in Sessions Case No.50 of 2003, whereby the present appellant has been convicted and sentenced to undergo five years' rigorous imprisonment and pay a fine of Rs.10,000/-, in default, one year simple imprisonment for the offence punishable under section 376 of the Indian Penal Code.

2. Brief facts leading to the present appeal are as under:-

2.1 The prosecutrix and her husband were residing at Village: Dudhala, Taluka : Dhari, District: Amreli with her children. On 26th March,2006 i.e. on the date of incident, both the prosecutrix and her husband Gobarbhai had gone to a field known as ”Kapuria Wadi” at 8:00 a.m. for watering the field. They were unable to fetch the water because machine was not working. Both the prosecutrix and her husband were attempting to start the machine so that the water can be fetched from the well. Meanwhile, present appellant-accused came there on motorcycle and, offered his help to start the machine and, therefore, husband of the prosecutrix gave the handle to start the machine to the present appellant-accused. Looking to the handle, the appellant told the husband of the prosecutrix that this handle cannot

operate the machine and, therefore, he has to bring another handle from the field belonging to Himmatbhai and, therefore, husband of the prosecutrix had gone to another field to get the handle. It is the case of the prosecution that during this time the appellant took advantage of absenteeism of the husband of the prosecutrix and, he demanded drinking water from the prosecutrix. The prosecutrix had thus, gone to take drinking water for the appellant-accused and in the meanwhile, it is alleged that rape was committed by the accused and, thereafter, a threat was administered by the appellant. After half an hour, husband of the prosecutrix came and FIR was registered on 27th June,2003 at 16:30 hours at Dhari Police Station being C.R.No.49/2003 for the offences punishable under section 376 and 506(2) of the Indian Penal Code. Necessary panchnama of scene of offence was also drawn. The clothes of the prosecutrix were also recovered and sent to FSL. Thereafter, the appellant- accused was arrested and his clothes were also recovered and sent to FSL and, thereafter, prosecutrix was also sent to Doctor for medical examination. Upon completion of investigation, charge-sheet was filed against the present appellant-accused. After the trial, the appellant has been convicted and sentenced to undergo five years' rigorous imprisonment for the offences

punishable under section 376 and 506(2) of the Indian Penal Code.

2.2 Learned advocate for the appellant submitted that there are lot of omissions and contradictions in the evidence of prosecution witnesses. Learned advocate for the appellant has taken this Court to the complaint at Exh-11 and deposition of the prosecutrix-p.w.2 at Exh-10 and pointed out that there is a lot of improvement in the version of the prosecutrix and, therefore, she is not a trustworthy witness. A corroboration is required in such type of case. Learned advocate for the appellant submitted that in fact, there is no corroboration to the deposition of the prosecutrix and the medical certificate issued by the Doctor at Exh-8 is also against the prosecutrix. Learned advocate for the appellant submitted that there are no marks of injuries upon the prosecutrix or upon the accused. Looking to the narration given by the prosecutrix, the injuries ought to have been caused to the prosecutrix and to the accused but looking to the Certificate issued by Dr. Kalubhai Padsala who has been examined as PW-1, it appears that there were no marks of injuries upon the prosecutrix as well as upon the accused and, therefore, false narration has been given by the prosecutrix. It is also submitted by learned advocate

for the appellant that there was a delay in lodging the FIR. The prosecutrix ought to have shouted at the time of incident if at all, such incident has taken place, but, she has not shouted. On the contrary, she had thereafter continued her work coupled with the fact that there were no injuries and, thus, the deposition of the prosecutrix is not trustworthy. The learned advocate for the appellant has also relied upon decision rendered by Hon'ble Supreme Court in the case of **Ashok Kumar Jha V/s. State of Bihar** reported in **IV (2002) CCR 75 (SC)** and has pointed out that the conviction and sentence awarded to the present appellant deserves to be quashed and set aside.

2.3 I have heard the learned Additional Public Prosecutor Ms. Nandini Joshi, who has submitted that looking to the deposition of the prosecutrix, who is examined as PW-2 at Exh-10, the conclusion arrived at by the Sessions Court, Amreli is absolutely true and correct. There is no omission or contradiction in her deposition. A rustic witness has given absolutely true and correct narration of incident in her own words without any exaggeration. The prosecutrix has clearly pointed out that the present appellant had committed rape when the accused sent her husband to bring another

handle to start the machine, which was fitted near the well. It is the appellant-accused, who has sent the husband of the prosecutrix to bring another handle and benefit of absenteeism of the husband of the prosecutrix was taken to commit an offence of rape against the will and desire of the prosecutrix. It is also submitted by the Learned Additional Public Prosecutor for the respondent-State that there are no contradictions in the depositions of prosecution witnesses. The scene of offence panchnama, the deposition of Gobarbhai Merambhai-PW-4, at Exh-14 corroborate the case of the prosecutrix. It is also submitted by the learned Additional Public Prosecutor that the injury is not sine qua non of the offence of rape. There can be a rape without injury especially looking to the facts of the present case, when the land was sandy, both as per the deposition of the prosecutrix as well as as per the scene of offence panchnama drawn at Exh-16. It is also submitted by the learned Additional Public Prosecutor that delay is always not fatal to the prosecution in lodging the FIR. Looking to the facts of the present case, the threat was administered by the appellant-accused. As per the depositions of the prosecutrix as well as of the husband of the prosecutrix at Exh-10 and Exh-14 respectively, neither delay in lodging the FIR nor absenteeism of marks

of injuries is against the case of prosecutrix. It is also submitted by the learned Additional Public Prosecutor that there was no enemocity between the prosecutrix and accused and, therefore, there is no question of false implication of appellant. Learned Additional Public Prosecutor has also relied upon the judgement delivered by the Hon'ble Supreme Court in the case of **Karnel Singh V/s. State of M.P.** reported in **(1995)5 SCC 518** and in the case of **Bharwada Bhoginbhai Hirjibhai V/s. State of Gujarat** reported in **(1983)3 SCC 217**.

3. Having heard the learned counsel for both the sides and looking to the facts and circumstances of the case and the depositions of the witnesses and evidence on record, I see no reason to interfere with the judgement and order dated 22nd September,2003 passed by the Sessions Judge, Amreli in Sessions Case No.50 of 2003 whereby, the appellant has been convicted and sentenced to undergo five years' rigorous imprisonment, and pay a fine of Rs. 10,000/-, in default, one year's simple imprisonment, for the offences punishable under section 376 and 506(2) of the Indian Penal Code, for the following facts and reasons:-

(i) Looking to the deposition of PW 2 - the prosecutrix at Exh-10, an explicitly clear deposition has been given, leaving no room for any doubt. There is no omission or contradiction in the deposition of the prosecutrix. The incident of rape has been clearly narrated in no uncertain terms by the prosecutrix. Nothing is being shaken or taken away in the cross-examination of the prosecutrix. It is narrated by the prosecutrix that the appellant took the advantage of absenteeism of her husband and committed rape on 26th March,2003 at about 11:00 a.m. Thereafter, threat was administered to the prosecutrix by the appellant-accused. When her husband came after half an hour, the accused had run away. It is the present appellant, who voluntarily came at the field and offered to help. Thus, it is the present appellant, who sent the husband of prosecutrix to bring another handle from the field of Himmatbhai and when the husband of the prosecutrix had gone, as per clear deposition of prosecutrix, the appellant had committed a rape. As the threat was administered by the appellant, there is a delay in lodging the FIR. FIR was lodged on 27th June, 2003 at 16:30 hours. Looking to the facts of the present case, I have no reason to doubt trustworthiness of the prosecutrix. On the contrary, the prosecutrix who is a rustic witness, in her own words,

had narrated the incident and had clearly pointed out that the appellant had committed a rape. There are enough corroborations to the evidence of the prosecutrix looking to the scene of offence panchnama at Exh-16 and looking to the deposition of PW-4- Gobarbhai Merambhai at Exh-14. In view of this corroboration, I am clearly of the opinion that the prosecutrix is a trustworthy witness. The FIR is a rough scatch of the whole incident. The prosecutrix is not a highly literate lady. She has given deposition after several days from the date of incident. Photographic memory cannot be expected for the incidental things. So far as the incident of rape is concerned, looking to the deposition of the prosecutrix, in my view, there are no omissions or contradictions. There are some sentences which are not in consonance with the complaint, but looking to the nature of the deposition, they are not fatal to the prosecution case. Every omission of facts is not a contradiction unless it is significant in nature. I have carefully perused the deposition of the prosecutrix coupled with her complaint at Exh-11, the scene of offence panchnama at Exh-13 read with deposition of Gobarbhai Merambhai at Exh-14 and deposition of doctor PW-1 at Exh-7 and as a cumulative effect, the conclusion arrived at by the Sessions Court, Amreli is absolutely true and correct.

(ii) It is also vehementally submitted by the learned counsel for the appellant that there is a delay in lodging the FIR. The incident had taken place on 26th March,2006 at 11:00 a.m., whereas FIR was registered on 27th June,2006 at 16:30 hours. This delay has not been satisfactorily explained by the prosecution as per the appellant. This attractive arguments cannot be accepted by this Court mainly for the reason that in her deposition at Exh.14, the prosecutrix has categorically mentioned that after committing a rape, she was administered the threat that if she conveyed this incident to anyone, she will be done to death by the accused. It is also to be seen that when her husband was sent to bring another handle to start the machine so as to fetch water from well, the accused committed a rape. Therefore, obviously she had no option but to stay in the field till her husband came. When her husband came, the appellant had run away. This factor is also against the present appellant. It is the present appellant, who had offered himself to help to both husband and wife to start the machine. It is the present appellant, who sent the husband of the prosecutrix to bring another handle from the field of Himmatbhai. Thus, present appellant sent the husband of the prosecutrix away from the field

and, thereafter, took benefit of his absenteeism for committing the rape. The behaviour of the appellant is also such that it leads this Court to believe that the version of the prosecutrix is true and correct. Generally if a person comes to help, he will not run away. Considering the deposition of Gobarbhai Merambhai at Exh-14, it is clearly mentioned that when he - the husband of the prosecutrix, returned with a new handle to start the machine, the appellant was not present. The husband of the prosecutrix has also narrated the incident and has also narrated as to the threat administered by the present appellant and, therefore, looking to the facts of the present case, the delay in loading the FIR is not fatal to the prosecution. The prosecutrix is a married lady, having children, residing in a village. Threat was administered and police station was away from the village. So, totality of these circumstances, if looked closely, in the facts of the present case, in my opinion, the delay is not going against the prosecution case. Mere delay in lodging the FIR is not helpful to the present appellant. In the facts of the present case, there were reasons for delay in lodging the FIR. Court cannot expect boldness of the prosecutrix, who is residing in a Village with the children, to lodge the FIR immediately, especially when the threat was administered

by the appellant. The degree of boldness is more with the appellant, who has committed the offence of rape in a broad day light. The same degree of boldness cannot be expected from the prosecutrix in filing the FIR. Thus, the delay in filing the FIR is not helpful to the appellant-accused.

(iii) Learned advocate for the appellant submitted that there were no marks of injuries neither upon person of the prosecutrix nor upon person of accused and in absence of marks of injuries, the Certificates issued by the Doctor lead to believe the fact that there may be either consent of the prosecutrix or narration of deposition of prosecutrix is totally false and, therefore, the prosecutrix is not trustworthy witness. This contention is also not accepted by this Court for the simple reason that marks of injuries on the person of prosecutrix or upon person of accused is not a sine quo non for committing the offence of rape. There may be offence of rape without injuries and no adverse inference can be drawn merely because there were no marks of injuries. Looking to Exh-16, that is, scene of offence panchnama, which was drawn immediately after filing of FIR, it is clear that it was a sandy land and, therefore, there cannot be marks of injuries. Similarly, it has been

narrated by the prosecutrix in her deposition at Exh-10 that the accused has committed the offence of rape on a sandy land and, so there were no injuries upon the prosecutrix. It is also narrated by the prosecutrix that there were no stones at the scene of offence and, therefore, the marks of injuries were not there upon body of the prosecutrix and threat was given by accused, therefore, no marks of injury upon body of the accused.

(iv) Learned counsel for the appellant contented that the prosecutrix could have resisted the act of rape but she has not done so and, hence she is a consenting party. This contention has not been accepted by this Court because there is no mathematical formula as to how the victim of rape has to behave. Some are strong to oppose whereas some are weak. The mathematical expectation from the prosecutrix is neither desirable nor warranted. It depends upon the accused as to how he is strong to commit the offence of rape so that the victim of rape may not be in a position to defend herself. The benefit of weakness of the prosecutrix to defend herself cannot be given to the strong accused and, therefore, how she had behaved when the rape is committed is not very material but what is material is whether the accused had committed the offence of rape or not. Looking to the deposition of the

prosecutrix, complaint, scene of offence panchnama, the deposition of PW-4 at Exh-14, it is the present appellant, who had committed the offence of rape. The circumstances were such that there could not be any injury in the facts of the present case. This will also lead to believe that there are no marks of injuries and, therefore, her version is supported by Exh-8 & 9, corroboration of medical evidence. Thus, the shouting by the prosecutrix at the time of rape committed by the appellant is not must and in absent of shouting, it cannot be said that she is a consenting party. Even it has been stated in the deposition of the prosecutrix that the accused had not allowed the prosecutrix to shout by putting a part of the saree in her mouth.

(v) It has been decided by the Hon'ble Supreme Court in the case of **Karnel Singh V/s. State of M.P.** reported in **(1995)5 SCC 518**, that mere delay in lodging the FIR does not raise the inference that the complaint was false. The Indian women are slow and hesitant to complain of such assault. Para-7 thereof reads as under:-

> *"7. We have carefully examined the evidence of the prosecutrix, the medical evidence of her examination and the evidence of the investigating Officer and we are inclined to think there is no risk involved in accepting the version of the*

prosecutrix. Her evidence shows that she had joined the two accused persons hardly three days before the incident as a labourer under a contractor. She was, therefore, in not too familiar an environment. She was the only female worker just out of her teens. Besides, the two accused persons and the prosecutrix there was one more person by the name Charan who was sent away to fetch tea. Taking advantage of the prosecutrix being alone in their company the appellant picked her up and took her inside the machine room, laid her on a pile of sand, removed her saree an petticoat, and had sexual intercourse with her against her wish. After he had satisfied his lust, he called his companion but before the latter could have her, she ran away and narrated the incident to Multanabai and then went in search of her husband, a rickshaw-puller. After narrating the incident to him, both of them went to the police station and lodged the complaint, Exhibit P-1, at about 4.10 p.m. It was said that there was considerable delay and sufficient time for tutoring and therefore her evidence could not be believed. There is no merit in this contention. The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathies with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false. The possibility of tutoring is ruled out because the evidence does not show that her husband knew the appellant and his companion before the incident. She too had started work hardly three days before and therefore she had no reason to falsely involve the appellant. No such reason is

> *even suggested. She was a poor labourer hired by a contractor just a few days back and had no enmity with the appellant and his companion. Nor is there any shch history so far as her husband is concerned. There is, therefore, no reason to doubt her word. As for corroboration the find of semen stains on her 'saya' and in her vagina leads sufficient assurance to her accusation. In State of Maharashtra V. Chandraprakash Kewalchand Jain this Court speaking through one of us (Ahmadi,J) had occasion to point out that a woman who is a victim of sexual assault is not an accomplice to the crime but is a victim of another person's lust and therefore her evidence need not be tested with the same amount of suspicion as that of an accomplice. She is not in the category of a child witness or an accomplice and therefore the rule of prudence that her evidence must be corroborated in material particulars has no application, at the most the court may look for some evidence which lends assurance.*
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> *(Emphasis supplied)*

(vi) It has been held in the case of **Bharwada Bhoginbhai Hirjibhai V/s. State of Gujarat** reported in **1983(3) SCC 217** that if the evidence of the victim is not suffering from any basic infirmity, as a general rule, corroboration should not be insisted upon. Looking to the facts of this case, it has been stated that when the prosecutrix was brought for medical examination, she was examined by Doctor – PW-1 Exh-7, blood sample were taken and sent to Forensic Science Laboratory. It was an astonishing fact that on 19th September,2003, the Forensic Science Laboratory Report was given. It was not

presented before the Trial Court, which was tendered to this Court. The FSL report reflects the fact that there was a presence of semen stains of appellant on the cloths of the prosecutrix, having a group “AB”. Thus, FSL report given by the Scientific Officer, Forensic Science Laboratory, Government of Gujarat, Junagadh, despite this clear evidence, which is in favour of the prosecution and against the appellant, has not been presented before the Trial Court. Learned Additional Public Prosecutor submitted that in pursuance of section 293 of the Code of Criminal Procedure, the report of Government Officer can be taken on record and, can be perused by this Court. Looking to this report also, the deposition of the prosecutrix appears to be true and correct narration of the incident. The benefit of the lethargic approach of the prosecution in not producing copy of Forensic Science Laboratory Report, looking to the facts of the present case, cannot be given to the appellant-accused. Even otherwise also, there is enough corroboration of the version of the prosecutrix by rest of the evidences on record especially at Exh-16, 14, 18 and 20.

4. As a cumulative effect of the aforesaid facts and reasons and in view of the judicial pronouncement as referred to hereinabove, it is proved beyond reasonable

doubt that the appellant had committed the offence of rape punishable under section 376 of the Indian Penal Code. The conclusion arrived at by the Learned Sessions Court, Amreli vide judgement and order dated 22nd September,2003 in Sessions Case No.50 of 2003 is true and correct and requires not to be interfered by this Court. The quantum of punishment awarded by the trial Court is also true and correct and in consonance with the guilt of the appellant-accused. As a result, there is no substance in this appeal. The same is hereby dismissed.

(D.N.PATEL,J)

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